

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DOUGLAS R. KANE and DEPARTMENT OF JUSTICE,  
FEDERAL BUREAU OF INVESTIGATION, Washington, DC

*Docket No. 02-114; Submitted on the Record;  
Issued June 13, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$47,069.52 overpayment of compensation from August 10, 1999 through August 7, 2000; and (2) whether the Office properly denied waiver of the overpayment.

On October 15, 1990 appellant, then a 38-year-old special agent, sustained a fractured left leg and dislocated his left ankle when he was fast roping and fell from a helicopter. The Office accepted his claim for a left ankle fracture and paid appropriate compensation.

On May 10, 1991 appellant filed a claim for a schedule award. His case record was forwarded to an Office medical adviser who determined, in a report dated December 10, 1991, that appellant sustained an 18 percent permanent impairment of the left lower extremity.

In a decision dated January 30, 1992, the Office granted appellant a schedule award for an 18 percent permanent impairment of the left leg for the period October 30, 1991 to October 26, 1992.<sup>1</sup>

On August 2, 1999 appellant filed a claim for recurrence of disability.

On March 7, 2000 the Office accepted appellant's claim for recurrence and paid appropriate compensation.

In a letter dated September 18, 1999, appellant requested reconsideration indicating that he experienced an increase in permanent impairment resulting from his October 12, 1990 injury and submitted additional medical evidence.

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<sup>1</sup> The record reflects that appellant filed a claim for an injury sustained December 6, 1994, claim No. A13-1072031. The Office accepted his claim for spinal subluxation.

On March 13, 2000 the Office referred appellant for a second opinion to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, for an evaluation of the extent of any permanent impairment arising from his accepted employment injury in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>2</sup> He determined that appellant sustained an 18 percent impairment of the left lower extremity, which was the sole impairment of the left lower extremity resulting from the accepted work injury of October 12, 1990.

In a decision dated April 6, 2000, the Office granted appellant a schedule award for an 18 percent permanent impairment of the left ankle<sup>3</sup> for the period August 10, 1999 to August 7, 2000.

On October 30, 2000 the Office made a preliminary finding that appellant had been overpaid benefits in the amount of \$47,069.52. The Office noted that the overpayment occurred because appellant received a schedule award for an 18 percent permanent impairment of the left lower extremity twice. The Office noted that the first schedule award was issued on January 30, 1992 for the period October 30, 1991 through October 26, 1992 when appellant was residing in Virginia. In 1995, appellant moved to California and filed a notice of recurrence of disability. Thereafter, the district Office failed to notice that appellant was previously granted an 18 percent permanent impairment of the left leg. Subsequently, the Office granted appellant a second schedule award for the left leg on April 6, 2000 for the period August 10, 1999 to August 7, 2000. The Office determined that appellant was found at fault in the overpayment as he should have been aware that he had previously received an 18 percent schedule award for the left leg. The Office indicated that appellant had the right to submit, within 30 days, evidence or arguments regarding the overpayment and his eligibility for waiver of the overpayment and provided appellant with an overpayment questionnaire to submit.

In a letter dated November 19, 2000, appellant indicated that he was not at fault in the overpayment. He noted that he had no reason to believe the April 2000 award was anything other than an additional 18 percent rating after his recurrence of disability was accepted. Appellant noted that the reason he filed the notice of recurrence in 1998 was that his condition had deteriorated and he believed he was entitled to an adjusted percentage of disability. He noted that the overpayment should be waived due to his deteriorated physical condition which has made it more difficult for appellant to perform his duties. Appellant also noted that if the Office seeks recovery of the overpayment this would represent a severe hardship especially since his salary will decrease substantially when he retires.

By decision dated August 27, 2001, the Office found that appellant received a \$47,069.52 overpayment of compensation from August 10, 1999 to August 7, 2000 for which he was without fault in creating. The Office noted appellant's argument that he believed the second award represented additional impairment and not compensation for the same percentage of impairment. The Office addressed appellant's argument in support of waiver and found that recovery of the overpayment would not defeat the purpose of the Federal Employees'

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<sup>2</sup> A.M.A., *Guides*, (4<sup>th</sup> ed. 1993).

<sup>3</sup> It appears from the context of the decision that the schedule award is for the left lower extremity.

Compensation Act<sup>4</sup> nor would it be against equity and good conscience. Therefore, waiver of overpayment was not granted.

The Board finds that appellant received an overpayment of \$47,069.52 in compensation from August 10, 1999 to August 7, 2000.

The record indicates that appellant originally received an 18 percent permanent impairment of the left leg in a schedule award dated January 30, 1992. The Office inadvertently paid 18 percent impairment again on April 6, 2000 resulting in appellant being overpaid the amount of the second award, \$47,069.52. The Office properly determined that for the period of August 10, 1999 to August 7, 2000 appellant received an overpayment of \$47,069.52. He does not dispute that he received the overpayment in question nor does he dispute the amount of the overpayment. The Board finds that the Office properly determined the amount of the overpayment that covered the period August 10, 1999 to August 7, 2000.

The Board further finds that the Office did not abuse its discretion in denying waiver of the overpayment.

Section 8129 of the Act<sup>5</sup> provides that an overpayment must be recovered unless “incorrect payment has been made to an individual who is without fault *and* when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.” (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.<sup>6</sup>

Section 10.436 of the implementing federal regulations<sup>7</sup> provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to “defeat the purpose of the Act.” Section 10.438 of the regulations<sup>8</sup> provides that “the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office] ... failure to furnish the information within 30 days of the request shall result in denial of waiver....”

In this case, appellant was advised by the Office to provide the necessary financial information by completing the overpayment recovery questionnaire issued on October 30, 2000 if he wanted to request waiver. In his November 19, 2000 letter to the Office, appellant

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<sup>4</sup> 5 U.S.C. § 8129(b).

<sup>5</sup> 5 U.S.C. § 8129.

<sup>6</sup> See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

<sup>7</sup> 20 C.F.R. § 10.436.

<sup>8</sup> 20 C.F.R. § 10.438.

delineated why recovery of the overpayment would be against equity and good conscience; however, he failed to submit a completed OWCP-20 form or otherwise submit financial information supporting his assertions. As a result, the Office did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act.<sup>9</sup>

With respect to whether recovery would be against equity and good conscience, section 10.437(a)(b) of the federal regulations provides that recovery of an overpayment is considered to be against equity and good conscience when an individual would experience severe financial hardship in attempting to repay the debt or, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse. Appellant asserts that he was not at fault in the overpayment and noted that the overpayment should be waived due to his deteriorated physical condition which has made it more difficult for appellant to perform his duties. He also noted that if the Office sought recovery of the overpayment this would represent a severe hardship when he retires. Appellant did not submit any financial information to show that he would experience severe financial hardship; that he relinquished a valuable right; or showed that his position changed for the worse. The Office did not have the necessary financial information to determine whether recovery of the overpayment would cause financial hardship or that he changed his position for the worse. The record indicates that appellant inadvertently received two schedule awards for 18 percent permanent impairment of the left leg for an overpayment of \$47,069.52. As stated previously, appellant failed to submit the financial information required by section 10.438 of the Act<sup>10</sup> which was necessary to determine whether appellant detrimentally relied on the overpayments. As appellant has not shown that recovery would “defeat the purpose of the Act” or would “be against equity and good conscience” the Board finds that the Office properly denied waiver of recovery of the overpayment.<sup>11</sup>

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<sup>9</sup> See 20 C.F.R. § 10.438 (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

<sup>10</sup> *Id.*

<sup>11</sup> As appellant is no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to the Office’s recovery of the overpayment; see *Lewis George*, 45 ECAB 144 (1993); *Levon H. Knight*, 40 ECAB 658 (1989); *Edward O. Hamilton*, 39 ECAB 1131 (1988).

The decision of the Office of Workers' Compensation Programs dated August 27, 2001 is affirmed.

Dated, Washington, DC  
June 13, 2002

Alec J. Koromilas  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member